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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DEXTER LAMONT HYATT, Defendant and Appellant.	G031317 (Super. Ct. No. O1WF2090) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed in part, reversed in part and remanded.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Robert M. Foster and Barry J.T. Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

Penal Code section 246 makes it a crime for any person to willfully discharge a firearm at an occupied building.[1] The primary issue in this case is whether

[1] All further statutory references are to the Penal Code.

Hyatt violated that statute by firing a pistol into a bar while he was standing just outside the doorway with his shooting hand extended into the bar. We find that, as a matter of law, Hyatt's actions did not violate section 246. We therefore reverse his conviction for that offense and remand the matter for resentencing. In all other respects, we affirm the judgment.

* * *

On the night of September 9, 2001, Hyatt and other Park Village Crips got into it with rival gang members at a bar in Garden Grove. After the bouncer ejected Hyatt from the bar, he retrieved a pistol from a vehicle in the parking lot and returned to the front door. The bouncer blocked the doorway, preventing Hyatt from reentering. However, Hyatt managed to reach around him and fire a shot into bar. In so doing, Hyatt extended his shooting hand inside the bar, but the rest of his body remained outside. The shot hit and wounded a bystander who had not been involved in the fight.

Hyatt was charged with attempted murder, street terrorism and shooting at an occupied building. Weapon enhancements and a gang enhancement were also alleged. After the court granted Hyatt's motion for acquittal on the attempted murder count, the jury convicted him on the remaining counts and found he acted for the benefit of a criminal street gang and personally used a firearm. The court sentenced him to 35 years to life in prison.

* * *

Hyatt claims he did not shoot *at* an occupied building in violation of section 246 because his shooting arm was inside the bar when he fired the shot. The Attorney General disagrees. He maintains Hyatt's conviction was proper because "[h]is actions were directed 'at' the building within the meaning and purpose of section 246." We think Hyatt has the better argument.

Section 246 provides, "Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor

vehicle, occupied aircraft, inhabited housecar . . . or inhabited camper . . . is guilty of a felony . . . ." In *People v. Stepney* (1981) 120 Cal.App.3d 1016, 1021, the court held "that the firing of a pistol within a dwelling house does not constitute a violation of . . . section 246." The defendant in that case entered the victim's home and shot up her television set. The People argued this was enough to violate section 246 because the statute "prohibits shooting at the listed targets from inside or out." (*People v. Stepney, supra*, 120 Cal.App.3d at p. 1018.) However, the court took a more restrictive view of the statute. It recognized "that as originally proposed, section 246 forbade discharging a weapon *into* a dwelling, but in the bill as enacted, *into* was changed to *at*. [Citation.]" (*People v. Stepney, supra*, 120 Cal.App.3d at p. 1020.) Yet it viewed this "change as intended merely to enable prosecution of those who discharge a weapon at a building but miss." (*Ibid*.) Relying on evidence the statute was enacted to combat "'the increasing frequency of shootings *into* homes by reckless, irresponsible and malicious persons,'" the court reasoned the statute could not be applied to those who fire from inside the building in question. (*Id*. at p. 1020, fn. 4.)

That does not mean the defendant must be standing out of doors at the time of the shooting. In *People v. Jischke* (1996) 51 Cal.App.4th 552, the court upheld the defendant's conviction for violating section 246 based on his firing a shot into the floor of his apartment. Because the shot penetrated the apartment below defendant's, the court determined the defendant fired *at* a dwelling house within the meaning of the statute – not his own dwelling house, but the one beneath it. (*Id*. at pp. 555-556.)

Taken together, *Stepney* and *Jischke* stand for the proposition that the defendant must be outside the target building when he shoots, in order to violate section 246. But neither case is directly on point here, because unlike the defendants in those two cases, Hyatt was partially inside and partially outside the building in question when he fired his gun. Nonetheless, the Attorney General submits section 246 covers that situation because "[i]n practical effect, as well as in intent, [Hyatt's] action in shooting

through the threshold [of the bar] was no different than if he had shot from 10 feet or a 100 feet back; his target was the undifferentiated interior of the building."

But Hyatt's intent and the effect of his actions are not the issue. Rather, we must decide whether he committed an act that is proscribed by the statute. The core conduct prohibited by section 246 is the discharging of a firearm. If the defendant's firearm is inside the building in question at the moment of discharge, it is difficult to see how he can be guilty of shooting *at* the building within the meaning of section 246, especially when, as explained in *Stepney*, the statute was designed to deter people from shootings *into* buildings. (*People v. Stepney, supra*, 120 Cal.App.3d at p. 1020, fn. 4.)

Still, the Attorney General posits that as Hyatt "stood outside the threshold, [he] shot 'into' the bar in the sense that he caused the bullet to enter it. He argues Hyatt's actions are analogous to the use of a hypodermic syringe, explaining that "a hypodermic syringe is used to inject substances 'into' the body, by means of a needle that penetrates the skin."

But the Attorney General's hypothetical makes the opposite point. Accepting *arguendo* his contention that the injection of drugs through a syringe and the insertion of a firearm into a room were comparable and should be analyzed in the same terms, we scoured the vast annals of medical and legal literature. Nowhere – not once – did we find a single instance in which it was said that drugs were injected "at" a patient. It may be, as the Attorney General argues, that the word " into" works for both our cases and the syringe, but the actual wording of the statute, which employs the preposition "at" does not. And we decline to accept an argument of statutory interpretation which requires us to conclude it was the Legislature's intent to use a preposition in a way no one had ever used it before.

Finally, the Attorney General suggests that Hyatt's proximity outside the bar gave him a better opportunity to hide from his victim than if he had been inside the

establishment. This, we are told, makes his conduct more dangerous and justifies the application of section 246 to someone who reaches into the building in question.

While this is interesting speculation, it is utterly without support in the legislative history leading up to the enactment of section 246. The Attorney General cannot show us, and we have been unable to find, the slightest suggestion that the Legislature considered this distinction. Nothing indicates the Legislature intended to quash a rash of crimes in which handguns were extended into buildings and fired.

Nor does the argument bear scrutiny on its merits. While one who stands outside and reaches into a building to fire a handgun will often – though not always – be more likely to escape detection by the occupants of the building than one who fires from inside the building, it must also be recognized that one who is completely outside the building will usually – but not always – be less susceptible of detection than one who reaches into it. So, the same greater-protection-of-the-occupants argument militates in favor of determining culpability by where the gun is as by where the shooter is.

For all these reasons, we find Hyatt did not violate section 246 by discharging his firearm inside Gaynor's Lounge. Although he himself was standing outside the bar, Hyatt's weapon was entirely inside it when discharged. We do not believe the phrase "discharge a firearm at an . . . occupied building" can be read to cover these facts.

We sympathize with our dissenting colleague's dissatisfaction with the result in this case. But the fact this one very unusual fact situation does not fit within the wording of the statute does not seem to us to justify re-writing the statute to include a usage of the word "at" which we cannot find anywhere else in law or literature.

If the Legislature wishes this statute to apply to parties who shoot "at or into" a building, they can easily say so. But the ease with which such a construction could have been adopted, and their failure to adopt it, indicates to us they may well have

intended that people who reach into a room to fire at their enemies should be covered by the assault statutes, rather than by the ones designed for drive-by shootings.

DISPOSITION

Hyatt's conviction for discharging a firearm at an occupied building (count three) is reversed and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

I CONCUR:

O'LEARY, J.

SILLS, P. J., dissenting:

The majority concludes that Hyatt did not shoot *at* the building because his hand and the barrel of his firearm was *in* the building at the time of the shot. Hyatt was outside when he raised the gun to fire at the occupants inside the building. That his fingers, clenched around the handle and trigger, crossed the threshold of the door at the moment of discharge, does not transform the significance of the fact that *he* was outside the bar, shooting inside the bar. Neither case—*People v. Stepney* (1981) 120 Cal.App.3d 1016 nor *People v. Jischke* (1996) 51 Cal.App.4th 552—cited by the majority changes that basic and pivotal fact. Logically, it is the physical location of the defendant that controls whether the statute is violated, not the position of the gun's muzzle. If the latter was the controlling factor, the defendant with the longest barrel or silencer would be rewarded, irrespective of his actual location. Under the "usual, ordinary import of the language" (*Stepney, supra,* 120 Cal.App.3d at p. 1019), Hyatt was outside the building, shooting at—albeit into—it.

When one shoots at a building, in all likelihood the fired round will enter the building. In rejecting the word "into" for "at," the Legislature obviously did not want to exclude those who shoot at a building but are lucky enough to miss the target or have the round ricochet off the exterior and not actually go into the structure. With the adopted wording, anyone standing outside a structure shooting at, or into it has violated the statute. Poor marksmanship should not be a defense.

SILLS, P. J.